

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WEINING JI AND AYUKO SHIINA	:	ORDER
		DTA NO. 820714
for Redetermination of Deficiencies or for Refund of New	:	
York City Personal Income Tax under the New York City	:	
Administrative Code for the Years 2000 and 2001.	:	

Petitioners, Weining Ji and Ayuko Shiina, 410 West 53rd Street, # 622, New York, New York 10019-5640, filed a petition for redetermination of deficiencies or for refund of New York City personal income tax under the New York City Administrative Code for the years 2000 and 2001.

The Division of Taxation appearing by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed February 2, 2006, seeking dismissal of the petition, or in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and (b) on the ground that there exists no material and triable issue of fact. The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with the exhibits attached thereto in support of the motion. Petitioners, appearing by Robert Upbin, CPA, did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this determination commenced on March 6, 2006,¹ the date on which petitioners' time to serve a response to the Division of Taxation's motion expired. After due consideration

¹ March 4, 2006 is the 30th day from February 2, 2006. However, as March 4, 2006 fell on a Saturday, petitioners' response to the Division of Taxation's motion was required to be filed by Monday, March 6, 2006 (*see*, General Construction Law §§ 20, 25-a).

of the documents and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order.

FINDINGS OF FACT

1. In protest of notices of deficiency L-023478187 and L-023478203, petitioners, Weining Ji and Ayuko Shiina, filed a timely request for a conciliation conference with respect to each notice with the Bureau of Conciliation and Mediation Services ("BCMS").

2. Petitioners' requests for conference list the following as their address:

Weining Ji and Ayuko Shiina
410 West 53rd Street, APT # 622
New York, New York 10019

3. Petitioners' requests for conference also list the following as their representative's name and address:

Robert Upbin, CPA
225 West 34th Street, Suite 1403
New York, New York 10122

4. Petitioners' representative appeared at the conciliation conference held on January 12, 2005 on behalf of petitioners.

5. BCMS subsequently issued a Conciliation Order to petitioners (CMS No. 203557), dated June 3, 2005, which denied petitioners' request and sustained notices of deficiency L-023478187 and L-023478203.

6. On Monday, September 12, 2005, the Division of Tax Appeals received the petition in this matter. The envelope in which the petition was sent bears a machine metered (Pitney

Bowes) postmark dated August 31, 2005. The petition challenging the two notices of deficiency was signed by petitioners' representative and dated on August 31, 2005.

7. In response to the petition, the Division of Taxation ("Division") filed an answer dated December 28, 2005. The Division's answer asserts, *inter alia*, that the Division of Tax Appeals lacks jurisdiction to hear the merits of this case since petitioners failed to file a petition within 90 days of the issuance of the conciliation order by BCMS. On February 2, 2006, the Division brought the subject motion on the same basis set forth in its answer, to wit, that since petitioners did not file a petition with the Division of Tax Appeals in a timely manner, there is no jurisdiction to address the matter.

8. In support of its motion for summary determination, the Division submitted, among other things, its answer to the petition; an affidavit of its representative John E. Matthews, Esq.; the affidavits of Robert Farrelly and Bruce Peltier, employees of the Division; a copy of the certified mail record ("CMR") containing a list of the conciliation orders allegedly issued by the Division on June 3, 2005; a copy of the conciliation order; copies of the cover sheets; and copies of petitioners' requests for conciliation conference

9. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by United States Postal Service ("USPS") certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the CMR.

10. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the

conciliation conferee for signature, who in turn, forwards the orders and covering letters to a BCMS clerk assigned to process the conciliation orders.

11. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation's Advanced Function Printing Unit ("AFP"). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

12. The AFP Unit also produces a computer-generated CMR entitled "Assessments Receivable, Certified Record for Presort Mail." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "CERTIFIED NO." The BCMS numbers are recorded under the heading "Reference No." and are preceded by three zeroes. The AFP Unit prints the CMR and cover sheets via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

13. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and covering letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, covering letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

14. On the last page of the CMR, the BCMS clerk stamps "POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas." and also stamps "MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT."

15. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “6/3/05” is written in the upper right corner of each page of the CMR.

16. The CMR, along with the cover sheets, covering letters, and conciliation orders are picked up, in BCMS, by an employee of the Division’s Mail Processing Center.

17. Attached to Mr. Farrelly’s affidavit is a copy of the four-page CMR which contains a list of the conciliation orders allegedly issued by the Division on June 3, 2005. This CMR lists 37 certified control numbers and there are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number is a reference number, the name and address of the addressee, and postage and fee amounts.

18. Information regarding the conciliation order allegedly issued to petitioners is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0665 3824 is reference/CMS number 000203557, along with the following address:

Weining Ji
410 West 53rd Street - #622
New York, NY 10019-5640

19. Page one of the CMR also contains information regarding a conciliation order allegedly issued to petitioners’ representative. Specifically, corresponding to certified control number 7104 1002 9730 0665 3862 is reference/CMS number 000203557 along with the following address:

Robert Upbin
225 West 34th Street - Suite 1
New York, NY 10122

20. The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and/or his or her initials or signature to the CMR indicating receipt by the post office.

21. In this particular instance, the postal employee affixed a postmark dated June 3, 2005 to each page of the four-page CMR. The postal employee also wrote his or her initials and "37 pieces" on the bottom of page four of the CMR to indicate the "total numbers of pieces received at the post office," in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the mail record.

22. Mr. Peltier states that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

23. Based upon his inspection of the CMR, Mr. Peltier states that he can determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on June 3, 2005 for the records of BCMS. Mr. Peltier further states that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail.

24. Petitioners did not respond to the Division's motion.

25. Documents in the file indicate that petitioners received the Conciliation Order on Monday, June 6, 2005. However, the record is silent as to the date on which petitioners' representative received the conciliation order.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

The motion shall be granted if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section three thousand

two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also, Matter of Service Merchandise, Co.*, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004; *see, Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v. Johnson, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. Petitioners did not respond to the Division’s motion for summary determination. Therefore, petitioners are deemed to have conceded that the facts as presented in the affidavits submitted by the Division are correct (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). However, in determining a motion for summary determination, the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v. Village of Patchogue Fire Dept., supra*, 536 NYS2d at 179; *see also, Weiss v. Garfield*, 21 AD2d 156, 249 NYS2d 458, 461).

C. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 681(b) the conciliation order in this case and the underlying notices of deficiency would be binding upon petitioners unless they filed a timely petition with the Division of Tax Appeals. A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The filing of a petition within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of DeWeese, supra*).

D. Where a taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A notice is mailed when it is delivered to the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). The mailing evidence required of the Division is two-fold: first, there must be proof of standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*). The United States Tax Court, interpreting provisions of the Internal Revenue Code analogous to those at issue herein, has decided that a properly completed Postal Service Form 3877 or its counterpart “represents direct documentary evidence of the date and the fact of mailing” of the assessment (*Wheat v. Commr.*, 63 TCM 2955, 2957 *citing Magazine v. Commissioner*, 89 TC 321, 324, 327). “Exact

compliance with the Form 3877 mailing procedures raises a presumption of official regularity in favor of [the Internal Revenue Service]” (*Wheat v. Commr.*, *supra*, 63 TCM at 2958, *citing United States v. Zolla*, 724 F2d 808, 810, 84-1 US Tax Cas ¶ 9175, *cert denied* 469 US 830, 83 L Ed 2d 59). When the Internal Revenue Service (“IRS”) is entitled to a presumption of official regularity, the burden of going forward is shifted to the taxpayers, and to prevail, they must affirmatively show that the IRS failed to follow its established procedures. If there is no fully completed Form 3877, the IRS may still prove, by documentary or direct evidence, the fact and date of mailing. However, it would not be entitled to the presumption of official regularity.

The Tax Appeals Tribunal has also held that a properly completed Postal Service Form 3877 represents documentary evidence of the date and the fact of mailing, shows the Division’s compliance with its own procedures and creates a presumption of official regularity in favor of the Division (*Matter of Air Flex Custom Furniture*, *supra*). As with the IRS, a failure to comply precisely with the Form 3877 mailing procedure need not be fatal to the Division’s case “if the evidence adduced is otherwise sufficient to prove mailing” (*Coleman v. Commr.*, 94 TC 82, 91). Further, the Tax Appeals Tribunal has found that a properly completed certified mail record is substantively the same as the Post Service Form 3877 (*see, Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

E. The Division’s proof in this case consists of the affidavits of Mr. Farrelly and Mr. Peltier, which were offered to establish the general procedure for mailing conciliation orders by certified mail, and a copy of the computer generated certified mail record, which was offered to establish that the procedure was followed in this instance. I find that there are notable contradictions in this proof.

The certified mail record fails to show that the general mailing procedures described in the Farrelly and Peltier affidavits were followed. In his affidavit, Mr. Farrelly stated that, after electronically receiving the name, mailing address, order date and BCMS number for each conciliation order to be issued on a particular day, the Division's Advanced Function Printing Unit assigns a certified control number for each mailing and then produces and prints a cover sheet that contains, among other things, the date of the mailing, the taxpayer's name, mailing address, BCMS number and certified control number. The AFP also produces and prints a computer-generated certified mail record that listed, among other things, the names, mailing addresses and the assigned certified control numbers of taxpayers and representatives to whom conciliation orders were issued on that particular day. In the instant case, only Weining Ji's name, address, and the CMS No. appear next to certified control number 7104 1002 9730 0665 3824 on page one of the certified mail record. However, the conciliation order was issued to both petitioners, Weining Ji and Ayuko Shiina. With respect to petitioners' representative, Robert Upbin, the address listed on page one of the CMR next to his name was 225 West 34th Street, Suite 1, New York, New York 10122. However, the address listed for Mr. Upbin on petitioners' requests for conciliation conference was 225 West 34th Street, Suite 1403, New York, New York 10122. Clearly, the certified mail record does not demonstrate that the standard procedure for the preparation of the certified mail record was followed in this case.

In his affidavit, Mr. Farrelly asserts that the full name and address of either the taxpayer or the representative may not appear or is truncated on the certified mail record because the amount of space available on the certified mail record to show the taxpayers' names and mailing address and the representative's name and mailing address is limited. Mr. Farrelly further asserts that the full name and address of either the taxpayer or the representative appears on the cover sheet and

therefore, appears in the window of the envelope. The Division's failure to include the full name and address of the taxpayer, or the representative or its truncation of same, due to space limitations on the certified mail record, violates Postal Service rules concerning the preparation of Form 3877 ("firm sheet"). USPS Domestic Mail Manual § 503(5.2.3) allows a mailer, such as the Division, who is requesting a certificate of mailing for three or more pieces of mail being presented at one time, to use a facsimile firm sheet containing "the same information as the postal-provided form." The firm sheet certificate "must show the names and addresses of the sender and addressee and may show the amount of postage paid. The mailer may also place identifying invoice or order numbers on the certificate." (*See*, USPS Domestic Mail Manual § 503[5.2.5].)

Given the Division's failure to comply with the certificate of mailing mailer preparation requirements set forth in USPS Domestic Mail Manual § 503(5.2.5) as well as its own general procedures for producing and mailing conciliation orders when it prepared the certified mail record in question, it cannot rely on that certified mail record to prove that it mailed the conciliation order to either petitioners or their representative on June 3, 2005.

F. Where the presumption of official regularity does not arise, the Division may present proof of actual mailing of the notice, including circumstantial evidence (*see, Matter of Snyder*, Tax Appeals Tribunal, December 11, 1997; *see also, Coleman v. Commr., supra*). Documents in the record indicate that petitioners received the Conciliation Order on June 6, 2005. As long as a statutory notice is received by a taxpayer in sufficient time to file a petition, the notice is valid (*see, Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228, *lv denied* 79 NY2d 759, 584 NYS2d 447) and the 90-day period to petition begins to run from the date of receipt (*see, Matter of Greene Valley Liquors*, Tax Appeals Tribunal, November 25,

1992).² It is unnecessary to address the adequacy of petitioners' proof that the petition was filed within 90-days of their actual receipt of the conciliation order because there is no evidence of actual delivery or a specific date of receipt of the conciliation order by their representative, Mr. Urbin. While the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the notice (*see, Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v. Frank*, 43 NY2d 168, 401 NYS2d 29). Since there is no evidence to establish the date of actual receipt of the conciliation order by petitioners' representative, the time period for filing a petition is tolled and the petition is timely.

G. The Division of Taxation's motion for summary determination or dismissal is denied.

DATED: Troy, New York
June 1, 2006

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

² The petition was due on Sunday, September 4, 2005. Since Monday, September 5, 2005 was Labor Day, the petition was due on Tuesday, September 6, 2005 (*see*, General Construction Law §§ 20, 25-a).